

EXHIBIT NN

FCC000000644

FOR PUBLIC INSPECTION

EXHIBIT NN

EchoStar 110 Corp. and MCI Telecommunications Corp., Application for Consent to Assignment of Authorizations and Request for Expedited Consideration, In re Application of MCI Telecommunications Corp. and EchoStar 110 Corp. (December 2, 1998).

FCC000000645

Exhibit NN

Page 2192

FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)
)
)

MCI TELECOMMUNICATIONS CORPORATION.)
Assignor)
)
)

File Nos. 73-SAT-P L-96

and)
)
)

ECHOSTAR 110 CORPORATION)
Assignee)
)
)

For Consent to Assignment of Authorization to)
Construct, Launch, and Operate a Direct Broadcast)
Satellite System Using 28 Frequency Channels)
at the 110° W.L. Orbital Location)
)

RECEIVED

DEC - 2 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

EXPEDITED ACTION REQUESTED

**APPLICATION FOR CONSENT TO ASSIGNMENT OF
AUTHORIZATIONS AND REQUEST FOR EXPEDITED CONSIDERATION**

December 2, 1998

FCC000000646

Exhibit NN

Page 2193

FOR PUBLIC INSPECTION

factors. MCI and News Corp./ASkyB have concluded that it is simply not economically sustainable to deploy, at this point in time, a system from 110° W.L. that would operate on a stand-alone basis. Rather, the 110° W.L. orbital location can effectively be used in conjunction with an existing system operating from another full-CONUS location. It is time that the 110° W.L. slot be put to use in accordance with its potential for introducing more robust competition in the MVPD market. Thus, the Commission's policies in favor of full and productive use of valuable spectrum resources militate in favor of action with all dispatch.¹² The Applicants respectfully request Commission action on the application by the end of February 1999.

A. The MVPD Market is Still Dominated by Cable Operators

1. The MVPD Market is the Appropriate Market for Analysis

At the outset, EchoStar emphasizes that the MVPD market – not any subset of that market – is the relevant market for analyzing the public interest impact of the proposed transaction. When performing such an analysis, the Commission determines the relevant product markets using a methodology similar to that described in the *1992 Merger Guidelines*, defining “a product market as a service or group of services for which there are no close demand substitutes.”¹³ Specifically, “the Commission must consider whether, if, in the absence of a

¹² See, e.g., *Policies and Rules for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, 13 FCC Rcd. 6907, 6942 (Int'l Bur. 1998) (“[W]e seek to promote efficient and expeditious use of spectrum and orbital resources and to create a competitive MVPD marketplace for the benefit of the subscribing community on a national and international basis.”).

¹³ *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd. 19985, 20014 (1997) (“NYNEX/Bell Atlantic”).

regulation, all carriers raised the price of a particular service or group of services, customers would be able to switch to a substitute service offered at a lower price."¹⁴

The Commission has consistently defined the relevant market as the MVPD market:

For purposes of analysis, competition in the delivery of video programming involves local markets in which consumers can choose among particular multichannel or other video programming distribution services. The products that are sold in these markets consist of bundles of attributes – antenna service, basic or optional tiers or packages of video programming channels, premium per-channel charge services, pay-per-view channels and others.¹⁵

The Department of Justice has independently corroborated the Commission's findings, stating in its recent antitrust suit against Primestar that "the relevant product market affected by [MCI's attempted assignment of its license at 110° W.L.] is the delivery of multiple channels of video programming directly to the home."¹⁶

In the context of its broad public interest analysis, the Commission must therefore review the effects of this transaction on competition between and among cable operators, DBS operators, and other MVPD services, with particular emphasis on competition between DBS and cable. EchoStar's existing DBS service corroborates that DBS operators can and do compete in the same market as cable operators – albeit from a handicapped position. EchoStar prices its

¹⁴ *Id.* at 20015.

¹⁵ 1997 *Competition Report*, 13 FCC Rcd. at 1039.

¹⁶ Primestar Complaint at ¶ 59.

service to beat comparable cable packages and tries to make its offerings as close a substitute for a cable subscription as possible.

Indeed, consideration of any market other than the MVPD market would undercut the Commission's efforts to promote competition between cable operators and other distributors. The 1992 Cable Competition Act leaves no doubt as to the market in which the Commission ought to promote effective competition. The Act itself states in its preamble that, "without the presence of another *multichannel video programming distributor*, a cable system faces no local competition."¹⁷ and contains provisions designed "to promote the public interest, convenience, and necessity by increasing competition and diversity in the *multichannel video programming market*...."¹⁸ In other words, the 1992 Cable Competition Act was meant to enable other participants in the MVPD market to compete more effectively with cable.

2. Despite the Best Efforts of DBS Operators, the Cable Industry Still Dominates the MVPD Market

Despite the significant progress of DBS and direct-to-home satellite services over the last few years, satellite-delivered MVPD services remain dwarfed in comparison to cable

¹⁷ *Cable Television Consumer Protection and Competition Act of 1992*, Pub. Law 102-385, 106 Stat. 1460 (1992) (emphasis added); see also S. Rep. No. 102-92, at 1 (1992) ("The purpose of [the Cable Competition Act] was] to promote competition in the *multichannel video marketplace* and to provide protection for consumers against monopoly rates and poor customer service.") (emphasis added); *id.* at 3 ("[The Senate] held three hearings in June 1989 on the general issue of competition in the *video programming industry*"); *id.* at 11 ("The question is when are the alternatives sufficient to eliminate cable's market power. In other words, when does a cable system face effective competition?") (emphasis added); *id.* at 16 ("[I]t is far from clear that satellite service can provide the necessary competition to cable.").

¹⁸ 47 U.S.C. § 548(a).

operators, which serve 87% of all U.S. MVPD households - 64.2 million subscribers - as opposed to a mere 9.8% household share for all DBS DTH services combined - just 7.2 million subscribers.¹⁹ After surveying the MVPD market in its 1997 *Competition Report*, the Commission concluded that cable operators continue to enjoy the position of a dominant monopoly bottleneck:

Incumbent franchised cable systems remain the primary distributors of multichannel video programming.... Local markets for the delivery of video programming generally remain highly concentrated and continue to be characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems.²⁰

Indeed, instead of being curbed, cable dominance may be on the verge of being even further reinforced. Cable operators throughout the country are adding digital upgrades, allowing them to provide additional tiers with new and specialized services, including high-bandwidth applications such as HDTV.²¹ In addition, TCI, the largest MSO in the nation, has recently requested Commission approval of its acquisition by AT&T.²² TCI and AT&T claim that their transaction would create "the first fully-integrated residential communications services

¹⁹ 1997 *Competition Report*, 13 FCC Rcd. at 1040.

²⁰ 1997 *Competition Report* at 1043.

²¹ See, e.g., L. Moss & K. Gibbons, *Fast Out of the Gate: Early MSO Reports on Digital Are Promising*, Multichannel News, Nov. 16, 1998; see also 1997 *Competition Report*, 13 FCC Rcd. at 1072 ("However, DBS's advantages may be minimized once cable systems install digital technology and can offer comparable programming features.").

²² See AT&T and Telecommunications, Inc., Applications for Proposed Transfers of Control (filed Sept. 14, 1998) ("AT&T-TCI Applications").

Because "the evidence of [then] *current* market performance indicated that DBS and cable [were then] differentiated products," the Commission found that "competition among DBS operators is likely to be enhanced by the entry of additional DBS operators that are not connected with current providers, and this price competition will translate into price competition with cable operators."⁴³

This environment has dramatically changed, largely due to EchoStar's efforts. Since the Commission released its *DBS Auction Rules*, EchoStar has launched its DBS service and embarked on an aggressive strategy of competing against cable on price, and has thus departed from the DBS model prevailing in 1995. This change has obviated any need for the Commission to "push" DBS operators in the direction of positioning themselves as substitutes for cable - EchoStar has so positioned itself voluntarily.

Second, it is now possible for DBS to compete head-to-head with cable by providing all of the services seamlessly offered by the cable industry beamed from two combined full-CONUS orbital local locations through a single dish. Specifically, when the Commission imposed the one-time one-slot rule, it believed that two-slot DBS service was not feasible:

It also appears that DBS systems may be currently unable as a technical matter to combine signals from more than one orbital location in a single service offering. The receiving equipment currently being used by DirecTV/USSB, and the equipment to be used by EchoStar/Directsat when it initiates service, cannot be used to receive signals simultaneously from more than one orbital location Therefore, transmitting signals simultaneously from multiple orbital locations would likely require subscribers to use additional equipment to avoid interference problems.⁴⁴

⁴³ *Id.* (emphasis in original).

⁴⁴ *Id.* at 9738.

FCC000000652

EXHIBIT OO

FOR PUBLIC INSPECTION

EXHIBIT OO

Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Fox/Liberty Networks, LLC*, FCC File No. CSR-5165-P, 13 FCC Rcd. 7394 (rel. April 17, 1998), available on Westlaw (1998 WL 177559) and Lexis (1998 FCC LEXIS 1844).

FCC000000653

Exhibit OO

Page 2316

FOR PUBLIC INSPECTION

Found Document

Rank(R) 1 of 1

Database
FCOM-FCC

1998 WL 177559 (F.C.C.), 13 F.C.C.R. 7394, 13 FCC Rcd. 7394,
12 Communications Reg. (P&F) 92

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF: ECHOSTAR COMMUNICATIONS CORPORATION
v.

FOX/LIBERTY NETWORKS, LLC

FX NETWORKS, LLC
CSR-5165-P

Program Access Complaint

DA 98-730

Adopted: April 15, 1998

Released: April 17, 1998

By the Acting Chief, Cable Services Bureau:

I. INTRODUCTION

1. EchoStar Communications Corporation ("EchoStar"), a provider of direct broadcast satellite ("DBS") services, filed the above-captioned program access complaint against FX Networks, LLC ("FX") and Fox/Liberty Networks, LLC ("Fox/Liberty"), alleging that FX has refused to provide its programming to EchoStar because of prohibited exclusive contracts that it has with cable operators across the country. EchoStar alleges that FX's refusal to deal with EchoStar regarding such programming violates the Commission's prohibition on exclusive contracts pursuant to Section 628(c)(2)(D) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.1002(c)(2) of the Commission's rules. [FN1] EchoStar also alleges that FX's action in this matter constitutes an unreasonable refusal to sell in violation of Section 628(c) of the Communications Act and Section 76.1002(b) of the Commission's rules [FN2] and an unfair practice in violation of Section 628(b) of the Act and Section 76.1001 of the Commission's rules. [FN3]

2. Based upon the record before us and pursuant to the Communications Act and the Commission's rules, we find that FX's actions violate Section 628(c)(2)(D) of the Communications Act's prohibition on exclusive contracts and constitute an unreasonable refusal to sell to EchoStar pursuant to Section 628(c). In light of this finding, we need not address Echostar's allegations relating to Section 628(b) of the Act.

II. BACKGROUND

3. Section 628 of the Communications Act prohibits certain unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming. [FN4] In enacting Section 628 of the Communications Act, Congress'

Copr. (C) West 2000 No Claim to Orig. U.S. Govt. Works

Westlaw.

Exhibit OO

Page 2317

Westlaw.

FCC000000654

FOR PUBLIC INSPECTION

6. EchoStar, a provider of DBS programming services, operates two DBS satellites that allow it to provide approximately 120 channels of digital television programming to subscribers throughout the continental United States. [FN13] EchoStar states that it competes against cable operators in every cable franchise area and is therefore a "multichannel video programming distributor" as defined by Section 76.1000(e) of the Commission's rules. [FN14]

7. FX is a wholly-owned subsidiary of Fox/Liberty; Fox/Liberty is a joint venture between Fox, Inc. ("Fox"), a subsidiary of The News Corporation, Ltd. ("News Corp."), and Liberty Media Corporation ("Liberty Media"), a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"). [FN15] Thus, through its wholly-owned subsidiary, Liberty Media, TCI, a cable system operator, [FN16] has a 50% ownership interest in FX. The programming controlled by FX is "satellite cable programming," as defined by our rules, because it is transmitted by satellite and is primarily intended for direct receipt by cable operators for retransmission to cable subscribers. [FN17] Accordingly, FX is a satellite cable programming vendor [FN18] in which a cable operator has an attributable interest, and is a vertically integrated programming vendor. [FN19]

IV. POSITIONS OF THE PARTIES

8. EchoStar alleges that it has been unable to obtain access to FX's programming, based on prohibited exclusive contracts that FX has entered into with various cable operators. [FN20] EchoStar notes, however, that TCI has informed EchoStar that it will not seek to enforce its contracts to prevent EchoStar from obtaining FX's programming [FN21] and that, accordingly, EchoStar has not named TCI as a defendant to this Complaint. [FN22] EchoStar further states that after TCI notified EchoStar that it would not seek to enforce its exclusive contract, FX informed EchoStar that it was prepared to negotiate only with respect to TCI franchise areas and non-cabled areas. [FN23] EchoStar then requested that FX identify all cable operators with whom FX has exclusive affiliation agreements. [FN24] EchoStar contends that FX refused to provide such a list stating that the terms of its affiliation agreements are confidential. [FN25] According to EchoStar, FX's unwillingness to provide this information demonstrates that FX provides programming under prohibited exclusive arrangements with cable operators other than TCI. [FN26] EchoStar also asserts that FX has not attempted to make the necessary public interest showing required through the filing of a petition for exclusivity in order to justify the continued enforcement of its exclusive contracts. [FN27]

9. In addition to alleging that FX is attempting to enforce prohibited exclusive contracts, EchoStar also alleges that FX's refusal to negotiate carriage of its programming with EchoStar constitutes an unreasonable refusal to sell in violation of Section 628(c). [FN28] Finally, EchoStar asserts that FX's unwillingness to negotiate with EchoStar to carry FX's programming, while offering such programming to certain cable operators, constitutes an unfair practice in violation of Section 628(b) of the Communications Act and Section 76.1001 of the Commission's rules. [FN29] EchoStar also requests that the Commission award it damages in this matter. [FN30]

10. In response, FX argues that its exclusive contracts were lawful when entered into because FX was not a vertically integrated programmer at the time. [FN31] According to FX, its subsequent vertical integration does not negate the validity of these agreements. [FN32] FX asserts that retroactive enforcement of the Commission's rules would expose programming entities that granted legal

programming vendor or a vertically integrated satellite cable programming vendor that meets the attribution standards outlined in the Commission's rules; and (ii) the defendant, as between the complainant and another MVPD competitor, has engaged in some form of non-price discrimination, such as an unreasonable refusal to sell its programming to the complainant. [FN62] To avoid a decision in favor of the complainant where the defendant has refused to sell its programming to the complainant, the defendant must establish that its refusal to sell its programming to the complainant is not unlawfully discriminatory because it is justified by legitimate business reasons. [FN63]

20. The first element requires that the defendant must be a satellite broadcast programming vendor or a satellite cable programming vendor that meets the Commission's attribution standards, FX does not dispute and we find that FX is a satellite cable programming vendor in which a cable operator has an attributable interest. The Commission's attribution standard set forth at Section 76.1000(b) and the notes to Section 76.501 of the Commission's rules, state that a cable operator will be considered to have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programmer, whether voting or non-voting, or if the operator holds limited partnership equity interest of five percent or more. [FN64] Defendants acknowledge that through its wholly-owned subsidiary, Liberty Media Corporation, TCI has a 50% ownership interest in FX and that FX is a "satellite cable programming vendor" in which a cable operator has an "attributable interest." [FN65]

21. With respect to the element of discrimination between competing MVPDs, the Commission has stated that in order to establish that another distributor is a competitor for purposes of showing discrimination under Section 76.1002(b), there must be "some overlap in actual or proposed service area." [FN66] FX has stated that, prior to the formation of a joint venture with News Corporation and TCI, FX entered into distribution agreements with nearly all of the major cable operators in the country. [FN67] Echostar offers its service on a nationwide basis. We therefore find that Echostar competes with cable operators in every franchise area in the continental United States. In addition, the complainant must show that the defendant discriminates between the complainant and its competitor in the sale of the programming in question. [FN68] FX, by virtue of its exclusive agreements with cable operators, and its refusal to sell to Echostar, discriminates between the complainant and its competitors.

22. As to the requirement that a complainant show the existence of non-price discrimination by defendant, the Commission has recognized that an "unreasonable refusal to sell" may constitute non-price discrimination under Section 628(c). [FN69] The Commission, however, has cautioned that unreasonable refusals to sell must be distinguished from refusal to sell based on legitimate reasons. [FN70] Other than asserting an exclusive contract, FX offers no evidence that its refusal to sell is based on legitimate business reasons.

23. We find that FX unreasonably has refused to sell its programming to Echostar. We do not agree with FX that its once valid exclusive contracts justify its refusal to sell to Echostar. FX offers no additional support which might constitute a legitimate business reason for its refusal to sell its programming to Echostar. We find that FX's refusal to sell is a violation of Section 628(c) of the Communications Act and Section 76.1002(b) of the Commission's rules.

24. In light of our finding in this matter regarding FX's violations of Sections 628(c), we find it unnecessary to address EchoStar's unfair method of

Copr. (C) West 2000 No Claim to Orig. U.S. Govt. Works

Westlaw.

Exhibit OO

Page 2323

Westlaw.

FCC000000656

FOR PUBLIC INSPECTION

EXHIBIT PP

FCC000000657

FOR PUBLIC INSPECTION

EXHIBIT PP

Reply of EchoStar Communications Corporation, *In re Application of MCI
Telecommunications Corp. and PRIMESTAR LHC, Inc.*, FCC File No. 106-SAT-AL-97
(October 20, 1997).

FCC000000658

Exhibit PP

Page 2329

FOR PUBLIC INSPECTION

Tark

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)

MCI Telecommunications Corporation)

and)

PRIMESTAR LHC, INC.)

For Consent to Assignment of Direct)
Broadcast Satellite Authorizations)

File No. 106-SAT-AL-97

REPLY OF ECHOSTAR COMMUNICATIONS CORPORATION

David K. Moskowitz
Senior Vice President and General Counsel
EchoStar Communications Corporation
90 Inverness Circle East
Englewood, CO 80112

Philip L. Malet
Pantelis Michalopoulos
Tekedra V. McGee
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/429-3000

Its Attorneys

Dated: October 20, 1997

FCC000000659

Exhibit PP

Page 2330

FOR PUBLIC INSPECTION

PRIMESTAR's record of aggressive competition is powerful evidence that the parade of imaginary horrors now being advanced by its competitive and philosophical opponents [are] entitled to no weight.

Id. at 4. Undeniably, however, PRIMESTAR's past record does not contain any proof that PRIMESTAR has competed against cable systems (as opposed to other satellite distributors).

In the same pleading, PRIMESTAR described what it considered "[t]he question of true policy significance before the Commission":

Will PRIMESTAR be allowed to continue to compete in the DBS business of making itself more efficient and gaining access to more effective tools? This is not about the cable industry taking over the DBS business; it is simply an effort to make an existing business an even more effective competitor.

Id. at 11.

Caught at its effort to transpose the real competitive question (competition against cable operators) into a question of competition in "the DBS business,"¹⁰ PRIMESTAR now tries to walk away somewhat from that effort. Even as it denies the accuracy of EchoStar's description, however, PRIMESTAR's statements with respect to competition against cable systems are carefully qualified. Instead of assuring the Commission that it will compete, PRIMESTAR only states: "there is no basis for predicting that PRIMESTAR will not compete against all MVPDs, including its cable MSO owners" (Opposition at 16); PRIMESTAR "cannot compete with DBS providers on a nationwide basis without also competing with all cable systems"; "even if PRIMESTAR were to try to compete only with rival DBS services, it would

¹⁰ While the phrase "DBS business" hints at an attempted gerrymandering of the relevant product market, PRIMESTAR has not denied, and cannot deny, that the MVPD market is the relevant market for analysis.

EXHIBIT QQ

FCC000000661

FOR PUBLIC INSPECTION

EXHIBIT QQ

Comments of EchoStar Satellite Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 00-132 (September 8, 2000), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511658008>.

FCC000000662

Exhibit QQ

Page 2357

FOR PUBLIC INSPECTION

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Rhonda M. Rivens
202.429.5495
rrivens@steptoe.com

DOCKET FILE COPY ORIGINAL

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3982
www.steptoelaw.com

September 8, 2000

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

RECEIVED

SEP 8 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: In the Matter of Annual Assessment of the Status of Competition in Markets
for the Delivery of Video Programming, CS Docket No. 00-132**

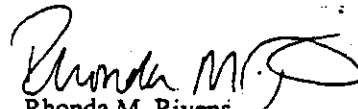
Dear Ms. Salas:

On behalf of EchoStar Satellite Corporation ("EchoStar"), enclosed please find for filing an original and nine (9) copies of EchoStar's Comments in the above-referenced matter.

Also enclosed is an additional copy of EchoStar's Comments, which we ask you to date-stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Rhonda M. Rivens
Counsel for EchoStar
Satellite Corporation

Enclosures

No. of Copies rec'd 019
List A B C D E

Page 2358

WASHINGTON

PHOENIX

LOS ANGELES

Exhibit QQ

FCC000000663

FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

SEP 8 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Annual Assessment of the Status of
Competition in Markets for the
Delivery of Video Programming

CS Docket No. 00-132

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Comments in response to the above-captioned Notice of Inquiry released by the Commission on August 1, 2000.¹ The Notice requests comments on the status of competition in the markets for delivery of video programming. EchoStar is a multichannel video programming distributor ("MVPD") providing Direct Broadcast Satellite ("DBS") service to subscribers throughout the United States. It currently operates 5 DBS satellites, with a sixth already launched and soon to commence commercial operations. EchoStar also plans to launch additional satellites. As of June 2000, EchoStar's DISH Network programming served more than 4.3 million households.

Effective competition has yet to arrive in the MVPD markets. Even though the increases in DBS subscribers have confirmed that DBS services are perhaps the only truly viable alternative to cable at this time, cable operators still dominate most MVPD markets. To EchoStar's knowledge, the increases in DBS subscriber counts over the past year have not been accompanied by corresponding decreases in the number of cable subscribers or by substantial erosion of cable market shares. In particular, cable operators preserve their stranglehold in urban areas. And while the Commission has made a number of

¹ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132 (rel. Aug. 1, 2000) ("Notice" or "NOI").

The Commission should also be aware of further significant distortions that have transpired in the video delivery markets. DIRECTV, the DBS operator with by far the largest subscriber base, has engaged in various types of anti-competitive conduct that have caused EchoStar to resort to the federal district court in Colorado asserting several claims under the antitrust laws.² The antitrust courts, and not this Commission, are the appropriate forum for evaluating these claims. At the same time, EchoStar believes that the Commission should apply the unfair practices provision to exclusive programming deals with any MVPD consistent with its admonition in the 1994 decision where the Commission declined to prohibit such agreements outright. It is DIRECTV's exclusivity deals with the sports leagues that constitute one of the most significant impediments to the promotion of stronger competition in the MVPD market.

I. CABLE OPERATORS CONTINUE TO DOMINATE THE MVPD MARKET

Incumbent cable operators clearly continue to dominate the MVPD market. This market power is evident not only from the predominant share of MVPD subscribers served by cable operators, but also from the continuing cable rate increases and the relatively few determinations that the FCC has made to date finding effective competition in particular cable franchises. In short, cable operators still exert an unacceptably high degree of market power – which in turn enables them to dominate the programming market, in many instances extracting anti-competitive terms and conditions from both affiliated *and* *unaffiliated* programmers. It is thus imperative that the Commission continue to take steps to curb the market power of cable operators and to limit the anticompetitive effects of such market power.

Any slight erosion in the market share of cable operators in the past year has not been significant enough to blunt cable operators' ability to raise cable rates and wield excessive influence over MVPD

² *EchoStar Communications Corp., et al. v. DIRECTV Enterprises, et al.*, Civil Docket Case No. 00-CV-212 (D.Colo.) (filed Feb. 1, 2000).

EXHIBIT RR

FCC000000666

FOR PUBLIC INSPECTION

EXHIBIT RR

EchoStar advertisement,

<<http://retailer.echostar.com/marketing/ads/previews/DumpCable.jpg>>.

FCC000000667

Page 2369

Exhibit RR


FOR PUBLIC INSPECTION

50

Cable Rates Are On The Rise Again...

DUMP CABLE

FOR DISH NETWORK!



FREE and FREE

**BASIC PROFESSIONAL
INSTALLATION** **DISH 500 SATELLITE
TV SYSTEM**

HERE'S HOW IT WORKS:

1. Receive a free quote and professional estimate from our experts to ensure the best fit for your home.
2. Receive a satellite dish and receiver system and activate your new DISH service. The 100 programming channels are yours for only \$10 per month. (No long-term contracts or equipment fees.)
3. Receive a satellite dish and receiver system and activate your new DISH service. The 100 programming channels are yours for only \$10 per month. (No long-term contracts or equipment fees.)
4. Receive a satellite dish and receiver system and activate your new DISH service. The 100 programming channels are yours for only \$10 per month. (No long-term contracts or equipment fees.)

More Local Channels NOW on DISH Network!

RETAILER INFORMATION HERE

dish
NETWORK

Now available for the price of \$100

© 2000 EchoStar Corporation. All rights reserved. EchoStar, the EchoStar logo, and the "50" logo are trademarks of EchoStar Corporation. All other trademarks are the property of their respective owners. Terms, conditions, and restrictions apply. See website for details.

FCC000000668

Exhibit RR

Page 2370

<http://retailer.echostar.com/marketing/ads/previews/DumpCable.jpg>

9/28/00

FOR PUBLIC INSPECTION